UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DORIS TSE, Ph.D,

Plaintiff,

-against-

NEW YORK UNIVERSITY,

Defendant.

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10-CV-7207 (DAB)

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION *IN LIMINE* TO EXCLUDE ECONOMIC DAMAGES, REINSTATEMENT AND ANY ARGUMENT THAT PLAINTIFF WAS QUALIFIED FOR ANOTHER JOB

Dated: New York, New York
May 20, 2016

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I. PRELIMINARY STATEMENT

Defendant New York University ("NYU") respectfully submits this memorandum of law in support of its motion *in limine* to preclude plaintiff Doris Tse, Ph.D. from seeking back pay, front pay or reinstatement at trial, as well as prevent her from arguing at trial that she was qualified to assume any alleged vacant jobs as of the date of her termination.

Dr. Tse is seeking back pay and front pay at trial on her remaining failure to accommodate claims under the Americans with Disabilities Act ("ADA"), New York City Human Rights Law ("CHRL") and New York State Human Rights Law ("SHRL"). The Court, however, should bar Dr. Tse from seeking such damages because Second Circuit and New York state case law clearly prescribe that, as a matter of law, a plaintiff who is disabled and unable to work cannot recover back pay or front pay for the entire period of her disability.

There is no question that Dr. Tse falls within the scope of this black letter law. Not only did Dr. Tse start receiving long-term disability ("LTD") benefits on April 5, 2011 – the day after her employment at NYU ended – but the Social Security Administration ("SSA") also determined that she was *totally disabled* under 42 U.S.C. § 423(d)(2)(A) as of "April 4, 2011" – her last day of work at NYU – and therefore awarded her Social Security Disability Income ("SSDI") benefits starting in October 2011. (SSA Notice of Award - Docket Entry No. 114-1.) Dr. Tse continues to receive SSDI benefits (now labeled as "Retirement," given that she turned age 65 in late-2015). (Docket Entry No. 114-2.) Given the exacting standard set forth in 42 U.S.C. § 423(d)(2)(A), the SSA's determination conclusively demonstrates that, as of April 4, 2011, Dr. Tse could not engage in *any* gainful work. Indeed, to obtain SSDI benefits under the statute, a claimant must have a:

> Physical or mental impairment of such severity that he is not only unable to do his previous work but cannot, considering his age,

> education and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.

42 U.S.C. § 423(d)(2)(A). Consequently, under the controlling case law, Dr. Tse's receipt of these benefits precludes her from recovering back pay or front pay for the period of her disability, which runs from the date of the termination of her employment on April 4, 2011 through the present time.

In addition, the SSA's determination forecloses any possibility of reinstatement, given that Dr. Tse is still disabled under 42 U.S.C. § 423(d)(2)(A), and thus unable to hold "any other kind of substantial gainful work." Indeed, it would run counter to the SSA's determination under 42 U.S.C. § 423(d)(2)(A) to hold that Dr. Tse is able to return to work in any capacity. Simply put, the complete disability required for a grant of SSDI benefits is incompatible with the remedy of reinstatement, which can be awarded *only if* a plaintiff is physically capable of returning to work and performing the essential job requirements. Here, the SSA determination makes it clear that Dr. Tse is unable to do so.

Finally, given the SSA's determination, it is clear that there was no other job at NYU that Dr. Tse was qualified to perform (assuming, of course, that she first can prove that there were any such vacant jobs for which she was qualified in April 2011), which means that she cannot claim that NYU failed to accommodate her by not finding her a vacant job before terminating her employment. Thus, the Court should preclude Dr. Tse from pointing to any other alleged jobs as a reasonable accommodation, as she suggested during the final pre-trial conference.

For these reasons and those demonstrated below, the Court should grant NYU's motion *in limine* and preclude Dr. Tse from seeking back pay, front pay and reinstatement, as well as preclude her from arguing that she was qualified for some alleged vacant job at NYU that should have been offered to her as an accommodation in lieu of termination.

II. ARGUMENT

A. DR. TSE CANNOT RECOVER BACK PAY OR FRONT PAY AS A MATTER OF LAW BECAUSE SHE HAS BEEN DISABLED AND COLLECTING DISABILITY BENEFITS SINCE HER TERMINATION ON APRIL 4, 2011

In the "Relief Sought" section of the Joint Pre-Trial Statement, Dr. Tse states that she seeks "damages for back pay . . . and front pay." (JPTO at 14.) Even if Dr. Tse can prove liability on her failure to accommodate claims at trial, the Court cannot award her any economic damages for back pay or front pay as a result of the alleged failure to accommodate because, since the day of the termination of her employment on April 4, 2011, she admittedly has continued to receive SSDI benefits through the present time (and LTD benefits until recently).

Under Second Circuit and New York state case law, a plaintiff who has been collecting SSDI (or LTD) benefits – and particularly who has been totally disabled and unable to work since the day of her termination – cannot recover any back pay or front pay: "The rule in the Second Circuit is clear – *viz.*, no back pay [or front pay] is available to a plaintiff during a period of disability." *Schlant v. Victor Belata Belting Co.*, 2000 U.S. Dist. LEXIS 16977, at *4-5 (W.D.N.Y. Nov. 9, 2000) (holding that a plaintiff cannot collect back pay or front pay when she is disabled and unable to work); *Malik v. Am. Int'l Group, Inc.*, Index No. 23055/10, NYLJ 1202598617070, at *5 (N.Y. Sup. Ct., Queens Cnty. Apr. 19, 2013) (granting summary judgment dismissing plaintiff's disability, gender, and race discrimination claims and her demand for back pay and front pay, and stating that because "plaintiff left work to go on disability and claims she cannot presently work due to her disability, back pay and front pay are not appropriate remedies in this case") (copy attached as Tab A).

The Second Circuit's decision in *Morley v. Ciba-Geigy Corp.*, 1997 U.S. App. LEXIS 24446 (2d Cir. Sept. 16, 1997), plainly articulates this controlling proposition of law. In *Morley*, the plaintiff filed an age discrimination claim with respect to the termination of her employment, and sought lost wages. *Id.* at *2-3. After her termination, plaintiff applied for and was granted SSDI benefits on the basis that she was totally disabled as of six months prior to her termination date. *Id.* The district court granted summary judgment dismissing the discrimination claim on the ground that plaintiff could not recover any damages because she had been terminated on account of her total disability, and because she "'suffered no lost wages as a result of the alleged age discrimination and is unable to return to work even today.'" *Id*. at *4. The Second Circuit affirmed, concluding that "[t]he district court properly granted summary judgment on the basis that plaintiff was unable to show that she suffered any harm as a result of the defendant's action." *Id*. at *5. In explaining its reasoning, the Second Circuit stated:

> By her own admission in sworn statements made to the Social Security Administration and the Workers' Compensation Board of New York, the plaintiff has been totally disabled from working since June 2, 1989. Because the plaintiff was not able to work during the time period in question, and is today still unable to work due to disability, she has not suffered any harm as a result of the defendant's alleged discrimination for which she can be compensated. Therefore, the district court's grant of summary judgment is affirmed.

Id. at *5-6; *see also Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 144-45 (2d Cir. 1993) (harassment and retaliation case, where Second Circuit affirmed district court's decision to exclude from back pay award the time when plaintiff was disabled); *Thornley v. Penton Publ'g, Inc.*, 104 F.3d 26, 31 (2d Cir. 1997) (age discrimination claim, where Second Circuit noted that a plaintiff in a discriminatory discharge case cannot recover back pay for a period when that plaintiff was disabled); *Hatter v. Fulton*, 1997 U.S. Dist. LEXIS 10429, at *16 (S.D.N.Y. July

21, 1997) ("Because there is no evidence whatsoever that [plaintiff] was capable of working at any time after the August 2, 1991 incident [and when she commenced her disability leave], she is not entitled to back pay."), *aff'd*, 1998 U.S. App. LEXIS 27571 (2d Cir. Oct. 22, 1998) (summary order).

Morse v. JetBlue Airways Corporation, 2014 U.S. Dist. LEXIS 78778 (E.D.N.Y. June 14, 2014), is directly on point and highly persuasive. In that case, the plaintiff – just like Dr. Tse – alleged that JetBlue failed to reasonably accommodate her disability and terminated her employment in violation of the ADA, CHRL and SHRL. *Id*. at *1. The plaintiff sought to recover economic damages in the form of back pay and front pay with respect to her claims. *Id*. at *2. The plaintiff had collected SSDI and LTD benefits throughout the period after JetBlue terminated her employment (and LTD benefits for approximately 6 months before her termination). *Id*. at *4-5. Based upon the plaintiff's receipt of SSDI and LTD benefits – which showed that she was "unable to work" during the relevant time period, including since the end of her employment, JetBlue filed a motion *in limine* to preclude her from recovering any back pay or front pay at trial. *Id*. at *2. The court granted that motion, "find[ing] that plaintiff's receipt of SSDI benefits . . . and LTD benefits . . . bars her from seeking front and back pay damages at trial." *Id*. at *6.

In reaching its decision, the court in *Morse* examined the standard for granting SSDI benefits under 42 U.S.C. § 423(d)(2)(A) and emphasized that "[t]he complete disability required for a grant of SSDI benefits is incompatible with back pay, which may only be awarded where a plaintiff 'suffered losses as a result of defendant['s] discrimination,' and not 'when a plaintiff would have been unable, due to an intervening disability, to continue employment.'" *Morse*, 2014 U.S. Dist. LEXIS 78778 at *13 (citation omitted). Similarly, the court aptly held that "[f]ront pay is similarly available only where a plaintiff is able to work, but the receipt of SSDI benefits is a determination that an individual cannot engage in any substantial gainful work that exists in the national economy, due to a sufficiently severe . . . physical impairment." *Id.* Consequently, the court held that "[i]t is, therefore, well-established that lost wages may not be ordered for periods where a plaintiff could not have worked due to disability." *Id.* at *13-14. This Court should reach the same conclusion.

The decision in *Schlant v. Victor Belata Belting Co.* is similarly instructive. In *Schlant*, the plaintiff filed suit alleging gender discrimination under Title VII and the SHRL in connection with the termination of her employment. 2000 U.S. Dist. LEXIS 16977, at *1. After her employment was terminated, plaintiff filed for Social Security disability benefits and, in doing so, stated that she had become permanently disabled and unable to work. *Id.* at *2. After a jury verdict in favor of plaintiff, the court addressed the equitable remedies of back pay and front pay. *Id*. In addressing that issue, the court cited *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 144-45 (2d Cir. 1993), and held that, "because a plaintiff is only entitled to be compensated for injuries suffered as a direct result of the discrimination, back pay is not available for any period during which the plaintiff was disabled." *Schlant*, 2000 U.S. Dist. LEXIS 16977, at *4. The *Schlant* court explained that:

> The reasoning underlying this rule is that a person would not be entitled to a salary while disabled and thus wages lost during such period are not the result of the discrimination. . . . 'The remedy in a discriminatory discharge case is intended to compensate a plaintiff only for losses suffered as a result of defendant's discrimination, and does not extend to granting back pay for a period when a plaintiff would have been unable, due to an intervening disability, to continue employment.' *Thornley v. Penton Publishing, Inc.*, 104 F.3d 26, 31 (2d Cir. 1997). *The rule in the Second Circuit is clear – viz., no back pay is available to a plaintiff during a period of disability.*

Id. (emphasis added; citation omitted).

The *Schlant* court reached the same conclusion with respect to front pay. Although the plaintiff sought to obtain front pay through her expected retirement at age 65 – even though she was "completely disabled and unable to work" – the court declined to award front pay, stating:

> A plaintiff cannot collect front pay when she is disabled and unable to work, because front pay is an alternative to reinstatement and therefore is not available to one who cannot work. . . . An award of front pay is made when reinstatement is neither possible nor practicable and the undisabled plaintiff has no 'reasonable prospect of obtaining comparable alternative employment.' . . . [The plaintiff] is not entitled to an award of front pay because the Court's discretion to award this equitable remedy was nullified February 11, 1994 when [the plaintiff] became and thereafter continued to be totally disabled.

Id. at *9-10; *Hamilton v. Niagra Frontier Transp. Auth.*, 2008 U.S. Dist. LEXIS 86739, at *5 (W.D.N.Y. Oct. 24, 2008) (FMLA claim, court noted that "[t]he remedy in a discriminatory discharge case . . . does not extend to granting back pay for a period when a plaintiff would have been unable, due to an intervening disability, to continue employment"); *Malik*, Slip Op. at *5 (concluding that, because "plaintiff left work to go on disability and claims she cannot presently work due to her disability, back pay and front pay are not appropriate remedies in this case").

As demonstrated above, the controlling Second Circuit and New York precedent clearly bars Dr. Tse from recovering back pay and front pay for her period of disability – which, according to the SSA Notice of Award, started on the same day her employment with NYU ended. (Notice of Award - Docket Entry No. 114-1.) Dr. Tse continues to receive these benefits, and thus remains completely disabled and unable to work. (Docket Entry No. 114-2.)

Further, even if Dr. Tse's receipt of SSDI and/or LTD benefits did not preclude her from recovering back pay and front pay – though it does as a matter of law – she still cannot recover such damages, because she cannot provide the Court with a sufficient or credible explanation for the disparity between her pending failure to accommodate claims and the SSA determination that she remains totally disabled under the standard in 42 U.S.C. § 423(d)(2)(A). *See Follis v. Mem'l Med. Ctr.*, 2010 U.S. Dist. LEXIS 7648, at *14 (C.D. Ill. Jan. 29, 2010) (plaintiff's SSA disability application barred her from recovering back pay and front pay in ADA reasonable accommodation case where plaintiff "has not provided the Court with a sufficient explanation" for the disparity between her ADA claim and the facts that "[p]laintiff's neurologist stated . . . that he did not believe Plaintiff was capable of working, and Plaintiff admitted that she stopped seeking employment after the SSA informed her . . . that she would receive [SSA disability] benefits.").

B. THE SSA'S DETERMINATION PRECLUDES DR. TSE FROM SEEKING REINSTATEMENT AT TRIAL

In the Joint Pre-Trial Statement, Dr. Tse also seeks reinstatement. (JPTO at 14.) The SSA's determination, however, forecloses any possibility of ordering reinstatement for Dr. Tse, given that she is still completely disabled under 42 U.S.C. § 423(d)(2)(A), and thus unable to hold "any other kind of substantial gainful work." Indeed, it would run counter to the SSA's determination that she has a complete disability under 42 U.S.C. § 423(d)(2)(A) and the language in that statute to hold that Dr. Tse is able to return to work in any capacity at NYU. *Id.* (claimant cannot "engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether . . . a specific job vacancy exists for him, or whether he would be hired if he applied for work"). That is because the complete disability required for a grant of SSDI benefits under § 423(d)(2)(A) is incompatible with the remedy of reinstatement, which may be awarded *only if* the plaintiff is physically capable of returning to work and performing the job. *E.g., Hatter*, 1997 U.S. Dist. LEXIS 10429, at *16-77 (Judge Knapp held that, "[i]n light of the fact that plaintiff continues to receive Workers' Compensation and her assertions that she is totally disabled, reinstatement is not an option."); *Thurman v. Yellow Freight Sys.*, 90 F.3d 1160, 1171-72 (6th Cir. 1996) (affirming denial of reinstatement where plaintiff injured himself and was unable to do heavy lifting required for the position, stating: "When the victim of discrimination is not capable of performing the job in question, instatement is not an appropriate remedy."). Here, the SSA determination makes it clear that Dr. Tse is totally disabled and unable to work at all.

C. THE SSA'S DETERMINATION PRECLUDES DR. TSE FROM ARGUING THAT NYU SHOULD HAVE ACCOMODATED HER BY GIVING HER ANOTHER JOB AS OF APRIL 4, 2011

At the final pre-trial conference on May 12, 2016, Dr. Tse suggested that, as part of any purported obligation by NYU to reasonably accommodate her, it could have given her another job in April 2011, instead of firing her. Aside from the fact that Dr. Tse never requested any accommodation after June 1, 2010, (Summary Judgment Opinion at 29) – let alone establish that there were any vacant positions after June 1, 2010 for which she was qualified – the SSA's determination that she was completely disabled as of April 4, 2011 makes it clear that she could not work in any job in the national economy, including any job at NYU. Because Dr. Tse could not work, she was not qualified to perform any of the essential functions of a job at NYU (or elsewhere) and there was no obligation to accommodate her. *See McBride v. BIC Consumer Prods. Mfg. Co.*, 583 F.3d 92, 97 (2d Cir. 2009) ("The plaintiff bears the burdens of both production and persuasion as to the existence of some accommodation that would allow her to perform the essential functions of her employment, including the existence of a vacant position *for which she is qualified*.") (emphasis added); *Shepheard v. City of N.Y.*, 577 F. Supp. 2d 669, 675 (S.D.N.Y. 2008) (granting summary judgment where plaintiff could not perform the essential functions of his position), *aff'd*, 360 Fed. Appx. 249 (2d Cir. 2009); 42 U.S.C.

§ 423(d)(2)(A) (claimant cannot "engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether . . . a specific job vacancy exists for him, or whether he would be hired if he applied for work"); N.Y.C. Admin. Code § 8-107(15)(b) ("In any case where the need for reasonable accommodation is placed in issue, it shall be an affirmative defense that the person aggrieved by the alleged discriminatory practice could not, with reasonable accommodation, satisfy the essential requisites of the job."). Consequently, Dr. Tse cannot claim at trial that NYU failed to accommodate her by finding a vacant job (if any) and the Court should preclude her from pointing to any other alleged jobs as a potential reasonable accommodation.

III. CONCLUSION

For each of the foregoing reasons, the Court should preclude Dr. Tse from recovering back pay, front pay and reinstatement at trial, as well as prevent her from arguing at trial that she was qualified to assume any alleged vacant jobs as of the date of her termination.

Dated: New York, New York
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